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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re:

PG&E CORPORATION,

-and-

**PACIFIC GAS AND ELECTRIC
COMPANY,**

Debtors.

☐ Affects PG&E Corporation

☐ Affects Pacific Gas and Electric
Company

☒ Affects both Debtors

** All papers shall be filed in the Lead
Case, No. 19-30088 (DM)*

Chapter 11

Case No.: 19-30088

(Lead Case)

(Jointly Administered)

**XL SPECIALTY INSURANCE
COMPANY'S OBJECTION TO:
(A) DEBTORS' AND SHAREHOLDER
PROPOSERS' JOINT CHAPTER 11
PLAN OF REORGANIZATION DATED
MARCH 16, 2020 [DKT. NO. 6320];
AND (B) SCHEDULE OF EXECUTORY
CONTRACTS TO BE ASSUMED
PURSUANT TO THE PLAN AND
PROPOSED CURE AMOUNTS [DKT.
7037]**

Date: May 27, 2020

Time: 10:00 a.m. (PST)

Place: United States Bankruptcy Court
Courtroom 17, 16th Floor
San Francisco, CA 94102

Judge: The Hon. Dennis Montali

1 XL Specialty Insurance Company (“XL Specialty”), by and through its
2 undersigned counsel, respectfully submits its objection to confirmation of the Plan (as
3 defined below) and to the Assumption Schedule (as also defined below) concerning the
4 XL Specialty executory contracts, and respectfully represents as follows:

5 **I. Introduction**

6 1. XL Specialty issued two Surety Bonds: (i) Bond No. US00088878SU19A
7 on behalf of Pacific Gas and Electric Company (“PG&E”) listing the State of California
8 as obligee, with a penal sum of \$25,000,000.00 and (ii) Bond No. US00088869SU19A on
9 behalf of PG&E listing the State of California as obligee, with a penal sum of
10 \$20,355,766.00 (collectively, the “Surety Bonds”). The Surety Bonds were issued in
11 accordance with Cal. Labor Code §§ 3700 to 3823 to enable PG&E to self-insure its
12 worker’s compensation program in accordance with PG&E’s application to the California
13 Director of Industrial relations.

14 2. As a condition to issuing the Surety Bonds, XL Specialty required that
15 PG&E and PG&E Corporation (“HoldCo”) (collectively with PG&E, “Debtors”) enter
16 into a General Indemnity Agreement (the “Indemnity Agreement”), pursuant to which the
17 Debtors agreed to indemnify and exonerate XL Specialty from any loss, cost, and
18 expense that XL Specialty incurred on account of the issuance of the Surety Bonds on
19 behalf of the Debtors (the “Indemnity Obligations”).

20 3. On October 21, 2019, XL Specialty filed its Proof of Claim (Claim No.
21 382) (“Proof of Claim”) listing its liquidated claim in the amount of \$26,819.09¹ and its
22 contingent and unliquidated claim up to the penal sums of the Surety Bonds. Copies of
23 the Surety Bonds are attached as Exhibits “A” and “B” to the Proof of Claim and the
24 Indemnity Agreement is attached as Exhibit “C” to the Proof of Claim, all of which are
25 incorporated herein by this reference.

26
27 ¹ XL Specialty included certain liquidated amounts in its Proof of Claim pursuant to *Travelers*
28 *Cas. & Sur. Co. of Am. v. PG&E*, 549 U.S. 443 (2007).

1 4. Paragraph 4 in the Indemnity Agreement provides as follows:

2 [The Debtors, jointly and severally, agree]: “To exonerate,
3 indemnify, hold harmless and keep indemnified the SURETY from
4 and against all demands, claims, losses, costs, liabilities, damages,
5 and expenses including, without limitations, attorney’s fees, expert’s
6 fees, interest, court costs, investigative expenses, document
7 reproduction and storage charges which the SURETY may sustain or
8 incur by reason of the issuance of the Bond(s) or INDEMNITOR’s
9 failure to perform or comply with any of the provision of this
10 Agreement . . .”

11 5. The Debtors are in default of Paragraph 4 of the Indemnity Agreement by
12 failing to indemnify and hold XL Specialty harmless from and against all losses, costs,
13 liabilities, damages, and attorney’s fees, court costs, investigative expenses, and
14 document reproduction. “The term ‘default’ ... is not arcane” and has usually been held
15 to mean “the failure to perform or fulfill some obligation or duty imposed by law or
16 contract.”² As discussed below, Debtors are in default under the Indemnity Agreement,
17 which makes 11 U.S.C. § 365(b)³ applicable.

18 **II. The Plan and Plan Supplement**

19 6. On March 16, 2020, the Debtors and Shareholder Proponents (collectively,
20 the “Plan Proponents”) filed the Debtors’ and Shareholder Proponents’ Joint Chapter 11
21 Plan of Reorganization, Dated March 16, 2020 [Dkt. 6320] (together with all schedules
22

23 ² See *In re Metromedia Fiber Network Inc.*, 335 B.R. 41, 48 (Bankr. S.D.N.Y. 2005)(court
24 defined the term “default” as follows, “The term ‘default’ in common parlance and as used by
25 lawyers and judges is not arcane or controversial. Simply stated, it means the failure to perform
26 or fulfill some obligation or duty imposed by law or contract. BLACKS LAW DICTIONARY
27 417 (6th ed. 1990) (A default is "the omission or failure to perform a legal or contractual duty.");
28 WEBSTER'S COLLEGIATE DICTIONARY 301 (10th ed. 2002) (A default is the ‘failure to do
 something required by duty or law.’); *Schneider v. Schneider*, 124 Misc. 2d 1084, 478 N.Y.S.2d
 1012, 1014 (N.Y. Sup. 1984) (‘A default is simply the omission or failure to perform a legal
 duty.’).”

³ Unless otherwise indicated, all references to “Code § _____” or “Bankruptcy Code § _____”
 are to Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended).

1 and exhibits thereto, and as may be modified, amended, or supplemented, the “Plan”).⁴

2 7. On March 17, 2020, the Court entered the Order (I) Approving Proposed
3 Disclosure Statement for Debtors’ and Shareholder Proponents’ Joint Chapter 11 Plan of
4 Reorganization; (II) Approving Form and Manner of Notice of Hearing on Proposed
5 Disclosure Statement; (III) Establishing and Approving Plan Solicitation and Voting
6 Procedures; (IV) Approving Forms of Ballots, Solicitation Packages, and Related
7 Notices; and (V) Granting Related Relief [Dkt. 6340] (the “Disclosure Statement
8 Order”).

9 8. On March 17, 2020, the Plan Proponents filed the solicitation version of the
10 Disclosure Statement for Debtors’ and Shareholder Proponents’ Joint Chapter 11 Plan of
11 Reorganization [Dkt. 6353], as supplemented by the Supplement to Disclosure Statement
12 for Debtors’ and Shareholder Proponents’ Joint Chapter 11 Plan of Reorganization,
13 approved by Court Order on March 25, 2020 [Dkt. 6483].

14 9. In accordance with the Plan and Disclosure Statement, on May 1, 2020, the
15 Plan Proponents filed the Notice of Filing of Plan Supplement in Connection with
16 Debtors’ and Shareholder Proponents’ Joint Chapter 11 Plan of Reorganization dated
17 March 16, 2020 [Dkt. No. 7037] (the “Plan Supplement”). The Plan Supplement
18 included as Exhibit “B” thereto the Schedule of Executory Contracts and Unexpired
19 Leases to be Assumed Pursuant to the Plan and Proposed Cure Amounts (the
20 “Assumption Schedule”).

21 **III. The Assumption Schedule Releasing and Disallowing XL Specialty’s**
22 **Claim is Contrary to the Plan and Code § 365(b).**

23 10. The Plan provides in Section 8.7, as follows:

24 **8.7 Insurance Policies.**

25 (a) All Insurance Policies (including all D&O Liability Insurance
26 Policies and tail coverage liability insurance), surety bonds, and

27 ⁴ Capitalized terms used but not defined herein shall have the meanings ascribed to them in the
28 Plan.

1 indemnity agreements entered into in connection with surety bonds
2 to which any Debtor is a party as of the Effective Date shall be
3 deemed to be and treated as executory contracts and shall be
4 assumed by the applicable Debtors or Reorganized Debtor and shall
 continue in full force and effect thereafter in accordance with their
 respective terms.

5 (Emphasis added).

6 11. The Plan provides in Section 8.2, as follows:

7 **8.2 Determination of Cure Disputes and Deemed Consent.**

8 (a) Any monetary defaults under an assumed or assumed and
9 assigned executory contract or unexpired lease, shall be satisfied,
10 pursuant to section 365(b)(1) of the Bankruptcy Code, by payment
11 of the default amount, as reflected in the applicable cure notice, in
 Cash on the Effective Date, subject to the limitations described
 below, or on such other terms as the parties to such executory
 contracts or unexpired leases and the Debtors may otherwise agree.

12 12. The Assumption Schedule in accordance with Section 8.7 in the Plan
13 provides, as follows:

14 **Insurance Policies.**

15 Pursuant to Section 8.7 of the Plan, all Insurance Policies (including
16 all D&O Liability Insurance Policies and tail coverage liability
17 insurance), surety bonds, and indemnity agreements entered into in
18 connection with surety bonds to which any Debtor is a party as of
19 the Effective Date of the Plan shall be deemed to be and treated as
 executory contracts and shall be assumed by the applicable Debtors
 or Reorganized Debtor and shall continue in full force and effect
 thereafter in accordance with their respective terms.

20 See pp. 19-20 of the Assumption Schedule (emphasis added).

21 13. However, Section 8 in the Assumption Schedule provides that any and all
22 claims in relation to the assumed executory contracts shall be released, expunged and
23 disallowed, as follows:

24 **Any counterparty to an Agreement that fails to timely file and**
25 **serve an Objection as proscribed herein will be deemed to have**
26 **assented to such assumption, assumption and assignment, and**
27 **Cure Amount. Except as otherwise set forth in the Plan or the**
28 **Confirmation Order, the assumption or assumption and**
 assignment of any executory contract or unexpired lease

1 pursuant to the Plan or otherwise shall result in the full release
2 and satisfaction of any Claims and Causes of Action against any
3 Debtor or defaults by any Debtor arising under any assumed
4 executory contract or unexpired lease at any time before the
5 date that the Debtors assume or assume and assign such
6 executory contract or unexpired lease, whether monetary or
7 nonmonetary, including all Claims arising under sections
8 503(b)(9) or 546(c) of the Bankruptcy Code, any defaults of
9 provisions restricting the change in control or ownership interest
10 composition, or any other bankruptcy-related defaults. On the
11 Effective Date of the Plan, any proofs of Claim filed with respect
12 to an executory contract or unexpired lease that has been
13 assumed, or assumed and assigned, under the Plan shall be
14 deemed disallowed and expunged, without further notice to or
15 action, order, or approval of the Bankruptcy Court.

16 See p. 7 in the Assumption Schedule (bold in original).

17 14. XL Specialty objects to the Assumption Schedule to the Plan Supplement,
18 which provides for a “full release and satisfaction of any Claims and Causes of Action
19 against any Debtor or defaults by any Debtor arising under any assumed executory
20 contract . . . at any time before the date that the Debtors assume or assume and assign
21 such executory contract . . . , whether monetary or nonmonetary, including all Claims
22 arising under sections 503(b)(9) or 546(c) of the Bankruptcy Code. . . . or any other
23 bankruptcy-related defaults. On the Effective Date of the Plan, any proofs of Claim filed
24 with respect to an executory contract or unexpired lease that has been assumed, or
25 assumed and assigned, under the Plan shall be deemed disallowed and expunged . . .”

26 See p. 7 of the Assumption Schedule (emphasis added).

27 15. As discussed in paragraph 5 above, the Debtors have defaulted under the
28 Indemnity Agreement and Code § 365(b) is applicable.

29 16. Section 365(b)(1)(A and B) of the Bankruptcy Code provide that if “there
30 has been a default in an executory contract,” then the debtor is required to: (a) “cure[], or
31 provide[] adequate assurance that the trustee will promptly cure, such default” and (b)
32 “compensate[], or provide[] adequate assurance that the trustee will promptly compensate

1 . . . for any actual pecuniary loss to such party resulting from such default” to be
2 permitted to assume such executory contract.

3 17. Under “§ 365(b)(1), the Bankruptcy Code requires a trustee to ‘promptly
4 cure’ defaults with respect to a lease or executory contract as a condition of assumption.”
5 *See Steinacher v. Rojas (In re Steinacher)*, 283 B.R. 768, 775, n.13 (Bankr. 9th Cir. 2002).

6 18. The Assumption Schedule attached to the Plan Supplement provides for a
7 partial release and disallowance of XL Specialty’s claim (as well as any other amounts
8 that may be due under the Indemnity Agreement, such as any potential PG&E defaults in
9 relation to the Worker’s Compensation Program) as of the date that the Bonds are
10 assumed under the Plan (i.e., the “Effective Date” under the Plan).

11 19. The Assumption Schedule to the Plan Supplement impermissibly
12 contradicts the requirements in Bankruptcy Code § 365(b) by failing to either promptly
13 cure the default under the Indemnity Agreement or providing adequate assurance that the
14 Debtors will promptly compensate XL Surety for any actual pecuniary loss to XL Surety
15 resulting from such default.

16 20. This partial release and disallowance of XL Specialty’s claim is contrary to
17 the provisions in the Plan and contrary to Bankruptcy Code § 365(b). Therefore, the Plan
18 cannot be confirmed pursuant to Bankruptcy Code § 1129(a)(1).

19 **IV.The Plan Violates Code §§ 1126(a) and 1129(a)(1) By Not Permitting XL**
20 **Specialty to Vote on Plan Acceptance.**

21 21. The treatment of XL Specialty’s unsecured claim against HoldCo is set
22 forth in Section 4.4 of the Plan, as follows:

23 (a) Treatment: In full and final satisfaction, settlement, release, and
24 discharge of any Allowed HoldCo General Unsecured Claim,
25 except to the extent that the Debtors or the Reorganized Debtors,
26 as applicable, and a holder of an Allowed HoldCo General
27 Unsecured Claim agree to a less favorable treatment of such
28 Claim, on the Effective Date or as soon as reasonably practicable
thereafter, each holder of an Allowed HoldCo General Unsecured
Claim shall receive Cash in an amount equal to such holder’s

1 Allowed HoldCo General Unsecured Claim. The Allowed
2 amount of any HoldCo General Unsecured Claim shall include
3 all interest accrued from the Petition Date through the Effective
Date at the Federal Judgment Rate.

4 (b) Impairment and Voting: The HoldCo General Unsecured Claims
5 are Unimpaired, and holders of HoldCo General Unsecured
Claims are presumed to have accepted the Plan.

6 *See* Section 4.4, Plan (emphasis added). XL Specialty's claim against PG&E is the same
7 as set forth in Section 4.23 in the Plan.

8 22. Bankruptcy Code § 1124(1) requires that a chapter 11 debtor's plan of
9 reorganization contain provisions for cure of any default under an executory contract
10 without otherwise altering the legal rights of the creditor, in order that the creditor's claim
11 may be deemed unimpaired for purposes of plan acceptance.

12 23. As discussed in Section III above, Section 8 in the Assumption Schedule
13 providing for a partial release and disallowance of XL Specialty's unsecured claim is a
14 Plan impairment of XL Specialty's claim to receive what it is entitled to pursuant to the
15 Bankruptcy Code. *See Solow v. PPI Enterprises (U.S.) (In re PPI Enterprises (U.S.)), 324*
16 *F.3d 197, 204 (3d Cir. 2003)*(court held that for impairment a bankruptcy court "must
17 examine whether the Plan itself is a source of limitation on a creditor's legal, equitable,
18 or contractual rights."). ⁵

19 24. Pursuant to Bankruptcy Code § 1126(a), since XL Specialty's claim against
20 the Debtors is impaired, it should be permitted to vote on acceptance or rejection of the
21 Plan. Since Sections 4.4 and 4.23 of the Plan provide that XL Specialty's claim against
22 the Debtors is unimpaired and that XL Specialty is presumed to have accepted the Plan,
23 the Plan violates Bankruptcy Code § 1129(a)(1) and cannot be confirmed.

24
25 ⁵ XL Specialty is not arguing statutory impairment of its claim. *See In re Ultra Petroleum Corp.*,
26 2017 Bankr. LEXIS 3192 (Bankr. S.D. Tex. Sept. 21, 2017)(court held that a claim is impaired
27 under a plan of reorganization if the holder of the claim receives less than what it is entitled to on
account of such claim under applicable state law).

1
2 **V. Reservation of Rights**

3 25. XL Specialty does not waive any, and expressly reserves its rights,
4 defenses, limitations and/or claims under the Bonds, the Indemnity Agreement,
5 applicable law or otherwise. Further, XL Specialty reserves its rights to amend, modify or
6 supplement this Objection in response to, or as a result of, any discovery being conducted
7 in connection with confirmation of the Plan and/or other submission in connection with
8 the Plan or filed by any other party in interest. Finally, XL Specialty reserves its right to
9 adopt any other objections to confirmation filed by any other party in interest.
10

11 **VI. CONCLUSION**

12 26. WHEREFORE, for the reasons set forth above, XL Specialty respectfully
13 requests that the Court enter an Order:

- 14 A. Directing the Plan Proponents to modify the Assumption Schedule to the
15 Plan Supplement to provide for either a promptly cure of the default under
16 the Indemnity Agreement or adequate assurance that the Debtors will
17 promptly compensate XL Surety for any actual pecuniary loss to XL Surety
18 resulting from such default.
19 B. Alternatively, denying confirmation of the Plan; and
20 C. Granting such other and further relief as the Court deems just and proper.

21 Executed this 14th day of May, 2020.

22 **SMTD Law LLP**

23 By /s/Robert J. Berens

24 Robert J. Berens
25 Marilyn Klinger
26 355 S. Grand Avenue, Suite 2450
27 Los Angeles, CA 90071

28 *Attorneys for XL Specialty Ins. Co.*

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Attorneys for XL Specialty Insurance Company

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re:

PG&E CORPORATION,

-and-

**PACIFIC GAS AND ELECTRIC
COMPANY,**

Debtors.

___ Affects PG&E Corporation
___ Affects Pacific Gas and Electric Company
X Affects both Debtors

** All papers shall be filed in the Lead Case, No.
19-30088 (DM)*

Chapter 11

Case No.: 19-30088
(Lead Case)
(Jointly Administered)

CERTIFICATE OF SERVICE

Date: May 27, 2020
Time: 10:00 a.m. (PST)
Place: United States Bankruptcy Court
Courtroom 17, 16th Floor
San Francisco, CA 94102
Judge: The Hon. Dennis Montali

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: SMTD Law LLP, 17901 Von Karman Avenue, Suite 500, Irvine, California 92614. On May 14, 2020, I served the within document, **OBJECTION OF INTERNATIONAL FIDELITY INSURANCE COMPANY TO TRUST DOCUMENTS**, on the interested party(s), listed below, follows:

☐ **FACSIMILE.** By transmitting via facsimile the document(s) listed above to the fax number(s) set forth on the attached Telecommunications Cover Page(s) on this date before 5:00 p.m.

- ☒ **U.S. MAIL.** By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Irvine, California addressed as set forth below in Exhibit "A". I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- ☐ **PERSONAL SERVICE.** By causing document(s) listed above to be personally delivered the person(s) at the address(es) set forth below.
- ☐ **OVERNIGHT COURIER.** By placing the document(s) listed above in a sealed envelope with shipping prepaid, and depositing in a collection box for next day delivery to the person(s) at the address(es) set forth below.
- ☒ **ELECTRONIC.** By electronically transmitting the document(s) listed above to the electronic notification address(es) of the addressee(s) listed below in Exhibit "A".

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **May 14, 2020**, at Irvine, California.

/s/Sonya Rodriguez
Sonya Rodriguez

EXHIBIT A

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